IN THE HIGH COURT OF JUDICATURE AT BOMBAY

(APPELLATE SIDE), BOMBAY

WRIT PETITION NO. 8331 OF 2005

Smt. Arni w/o Nozer S. Katagara
aged about 72 yrs., Occp. House wife
residing at 3rd & 4th floor,
83-85, Ghoga Street,
Mumbai – 400 001.
(Original defendant No.1) :: PETITIONER

-: Versus :-

1. Jaswant Premachand Lalani
adult, presently residing at
Kambli Wadi, Tejpal Road,
Vile Parle (East),
Mumbai – 400 057.

2. Mahendara P. Lalani,
adult, presently residing at
Sadgurukrupa Utkarsha Cooperative
Housing Society Ltd., Bhudarpara,
Ahmedabad.

3. Virendra P. Lalani
adult, presently residing at
Kambli Wadi, Tejpal Road,
Vile Parle (East),
Mumbai – 400 057.

4. Kiran P. Lalani, adult,
presently r/o Kambli Wadi,Tejpal
Road, Vile Parle (East), Mumbai – 400 057.

5. Pankaj P. Lalani,
adult, presently residing at
Utkarsha Cooperative Housing
Society Ltd., Bhudarpara,
Ahmedabad.

6. Piyush P. Lalani,
adult, presently residing at
Kambli Wadi, Tejpal Road,
Vile Parle (East),
Mumbai – 400 057.
(Original plaintiffs)

7. Nariman s/o Sorabji Katagara
adult, heir of deceased Sorabji
Katagara, doing business in the
name and style of Roshani Electrical
Works, Ghoga Street, Fort,
Mumbai – 400 001.
(Original defendant No. 2) :: RESPONDENTS

P. S. Dani with S. M. Tendulkar for the petitioner.

N. H. Shukla for the respondents.

CORAM : V. C. DAGA, J.

RESERVED ON : 19th December, 2005.

PRONOUNCED ON : 25th January, 2006.

P.C. :

This petition is directed against the judgment and order dated 10th & 11th August, 2005 passed by the appellate bench of the Small Causes Court at Bombay in Appeal No. 374 of 2001 confirming the judgment and decree passed by the Small Causes Court at Bombay dated 30/3/2001 in R.A.E. Suit No. 980 of 1991 directing the delivery of vacant possession of the suit premises to the plaintiffs within a period of four months from the date of passing decree since plaintiffs have proved and established their bonafide need for the suit premises.

FACTS :

2. Undisputed facts reveals that respondent Nos. 1 to 5 – original plaintiffs are the co-owners of the property bearing Municipal No. 83/85 situated at Ghogha Street, Fort, Bombay –

400 001 (“suit property” for short).

3. The original tenant late Sorabji Premji Katagara; died intested leaving behind his two sons and widow as his survivors. The widow of Sorabji expired on 01/3/1972. Sons of the deceased Sorabji were and are Nozar and Nariman. Nariman left the suit premises, while Sorabji was alive and other son Nozar who was residing with the deceased tenant Sorabji, at the time of his death, continued to stay in the suit premises till his death which occurred on or about 04/3/1990. Said Nozar is survived by his widow Mrs. Annie – petitioner/defendant No.1. Except petitioner / defendant No.1, there is no other survivors or legal heirs of the said Nozar. She is occupying 3rd floor and attic portion on the 4th floor with open terrace. The suit was filed by the plaintiffs for their bonafide use and occupation contending that plaintiff/respondent Nos. 1, 3 4 and 6 are staying at Bombay in the rented premises; whereas plaintiff/respondent Nos. 2 and 5 are staying at Ahmedabad who intend to shift to Mumbai. Respondent Nos. 2 to 5 and 6 are married. Plaintiff No.3 has one daughter, plaintiff No. 4 has a daughter and a son and

plaintiff No.5 has two daughters. According to the plaintiffs, the premises occupied by them is insufficient to accommodate their growing family and that respondent Nos. 2, 3 and 6 are desirous of staying independently in an independent portion of their house and that they do not want to continue with the rented accommodation. Respondent-plaintiff No.2 wants to come permanently at Mumbai to establish his business, but for want of accommodation, he is not in a position to come back to Mumbai. With the afore stated plaint pleadings the suit came to be filed.

4. On being summoned, the defendants appeared and denied bona fide need of the land lord-plaintiffs/respondent Nos. 1 to 6 herein. The trial Court framed issues relevant to the pleadings.

5. The parties to suit led their respective evidence.

The plaintiffs examined respondent Nos. 2 to 4 and 6 in support of their claim. Each of them deposed in support of their need. Defendant No.1 examined herself. The defence of the defendant-tenant was not accepted by either of the Courts

below. Whereas both the Courts below concurrently held that the need of the plaintiffs was established. With the result, the petitioner-defendants based on concurrent findings of facts suffered decree for eviction and possession which is the subject matter of challenge in this petition filed under Article 227 of the Constitution of India.

SUBMISSIONS :

6. Mr. Dani, learned counsel appearing for the petitioner began his submissions contending that the Courts below ought to have granted a decree for partial eviction of tenant, which according to him mandates the Court to consider whether or not the partial eviction of the tenant as contemplated under the Act should be ordered or the entire holding should be directed to be evicted. Mr. Dani, in support of his submissions for the first time, in the writ petition, filed an affidavit along with a rough sketch of the suit premises on the record to establish that partial eviction is possible.

7. The aforesaid contention advanced cannot be accepted for more than one reason. Firstly, no such plea was raised during the trial of the suit. No evidence is available on record in this behalf. For the first time such defence in the writ petition for want of foundation, cannot be accepted (*see-* ***Gopalsingh vs. Mumtaz Hussain*** *- 1996 (1) Mh. L. J. 742*). Hence, plea raised is rejected. The submission relating to partial eviction is pregnant with the admission that the land lords are in need of the premises and decree of partial eviction can satisfy their need.

8. Now, let me consider the case of bonafide need independent of the above submission in the light of the submissions made by the learned counsel for the petitioner. It is not in dispute that the landlords are presently staying at rented house at Vile Parle, Mumbai in an area admeasuring 550 sq. ft. It is also not in dispute that two brothers are desirous of shifting at Mumbai. It is also not in dispute that the premises were required by the plaintiffs for business purpose to establish and run their business therein. It is also not in dispute that as per the

provisions of Section 25 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, commercial premises cannot be converted into residential premises, it being the offence under the Act. The plaintiffs are waiting for vacation of the suit premises so as to enable plaintiff No.3 to shift from Ahmedabad and to start his business in a vacant portion. In this view of the matter, premises got vacated for business purposes cannot be taken into account to satisfy the residential need of the plaintiffs.

9. The findings recorded by both the Courts below in this behalf can be supported on the basis of material available on record. The evidence cannot be re-appreciated once again in writ jurisdiction so as to dislodge the concurrent findings of fact. (*see* - ***Peter Joseph Corporation Pvt. Ltd. vs. Poona Diocesan Corporation Pvt. Ltd.*** *- 1995 (1) Mh. L. J. 698).*

10. So far as the question of hardship is concerned, ample evidence is on record to suggest that the property known as Jimmy Chambers, a three storied building in which petitioner

has her share is available for occupation with her nephew Mr. Jimmy who according to her is staying with her though his family stays in the Jimmy Chamber. His name appears to have been incorporated in the ration card held by petitioner/defendant No.1 whereas the names of other family members of Jimmy do not find place in the ration card held by the petitioner/ defendant No.1.

11. It is also not in dispute that one Ms Jasmin is shown to be staying with petitioner/defendant No.1; her parents are staying in the same locality in a building (just opposite to the suit building) bearing No. 84, Janmabhoomi road, Fort, Bombay-400 001 on the third floor of the said building.

12. The document produced on record to show that Jasmin and Jimmy both of them are staying with the petitioner/defendant No.1. These documents appear to have been got prepared during the pendency of the suit. It is thus clear that the intention was to permit them to claim or enable them to inherit the tenancy rights after the death of the petitioner; who

has practically reached the age of 95 years. All these documents appears to have been manufactured only with an evil eye on the suit premises.

13. The petitioner filed an affidavit on record to suggest that she be allowed to occupy the suit premises during her life time. None of the occupants who are staying with her would claim tenancy rights. The said proposal cannot be accepted because none of the other occupants are party to the affidavit and this would not bind other claimants (if any). Even otherwise, landlords-plaintiffs have established their bonafide need as the question of permitting her to occupy the suit premises during her life time does not arise.

14. At this juncture, it will not be out of place to mention that against the judgment and decree passed by the Division Bench of the Small Causes Court in exercise of its appellate jurisdiction having not being made subject matter of the second appeal or revision to the High Court is only with an intention to give finality to the decision of appellate authority. If that be so,

the High Court, in exercise of writ jurisdiction under Article 227 cannot assume unlimited prerogative to correct all species of hardship or wrong decisions. Exercise of jurisdiction must be restricted to the cases of grave dereliction of duty and flagrant abuse of fundamental principles of law or justice where grave injustice would be done unless High Court interferes (*see* - ***Laxmikant vs. Pratapsingh*** *– 1996 (1) Mh.L.J. (SC) page 507*). It is, thus, not open for the High Court to re appreciate the evidence and interfere with the concurrent findings of fact in a petition filed under Article 227. In the case at hand, no fault can be found with the findings recorded by both the Courts below.

15. The petitioner is not likely to suffer hardship because she can occupy other premises referred to hereinabove located in the same locality. She can very well occupy the said premises along with her nephew Mr. Jimmy; whose family is already occupying part of the building owned by them, in which she has her share. There should be no difficulty in her way to stay with the family of Mr. Jimmy when she treats him as her family member. Thus, considering the totality of the facts and

circumstances of the case, no case is made out to interfere with the impugned judgment and decree of the trial Court affirmed by the lower appellate Court.

16. The petition, is therefore, dismissed in *limine* in terms of this order with no orders as to costs.

17. The learned counsel for the petitioner had prayed for eight weeks' time to approach the Apex Court in the event petition is dismissed. Time is, accordingly, granted on usual terms and conditions.

(V.C. DAGA, J.)